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Application of the Minitrial
in Department of Defense Contract Disputes

by

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This thesis first explores previous Government attempts to arrest the proliferation of litigation through the Contract Disputes Act of 1978, and then discusses initial attempts at utilizing alternative disputes resolution (ADR) methods as alternatives to traditional courtroom battles.

One such ADR methodology is the minitrial, which has been used successfully by private industry since the early 1980's. Details of a "typical" min are provided, including its advantages and disadvantages. Additionally, criteria are established to assist in determining whether a minitrial would be bene in resolving disputes between the DoD and one of its defense contractors.

Finally, recommendations are presented for utilizing ADR, specifically the minitrial, as a viable alternative to litigation.

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This thesis first explores previous Government attempts to arrest the proliferation of litigation through the Contract Disputes Act of 1978, and then discusses initial attempts at utilizing alternative disputes resolution (ADR) methods as alternatives to traditional courtroom battles.

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Finally, recommendations are presented for utilizing ADR, specifically the minitrial, as a viable alternative to litigation.

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I. INTRODUCTION

Abraham Lincoln, one of America's greatest Presidents and lawyers, once said:

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser--in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man....Never stir up litigation. A worse man can scarcely be found than one who does this. [Ref. 14:p. 113]

A. BACKGROUND

Contract disputes between the Department of Defense (DoD) and its contractors are presently being settled, with a few exceptions, using the procedures outlined in the Contract Disputes Act of 1978 (CDA). This law permits DoD contractors, who have a dispute, to utilize either the Armed Services Board of Contract Appeals (ASBCA) or the U.S. Claims Court. The Government's methods for resolving contract disputes are incorporated into both the Federal Acquisition Regulation (FAR) and the Defense Federal Acquisition Regulation Supplement (DFARS).

Government contracting officers and contractors have had both difficulty and disagreement with some aspects of the CDA's procedures. The adversarial tone of the legal formalities, in many cases, ends up becoming a self-fulfilling prophecy, when solid business relationships are destroyed over

legal and technical jargon. These disputes should not have to become a win-lose situation, where one "side" is completely "right." Additionally, the CDA process is very time-consuming and in many cases, the cost of settling claims may be higher than the value of the claim itself.

Within the private sector, some of the largest and most respected corporations have utilized other dispute resolution methods as alternatives to the traditional courtroom battles. Companies have shown a willingness to forfeit some legal safeguards in order to gain an expedient solution that maintains a worthwhile business relationship.

These alternatives have become known collectively as ADR (Alternative Disputes Resolution). There are three primary ADR mechanisms; arbitration, mediation, and negotiation, and numerous variations and combinations. One such hybrid is known as the minitrial, which has slowly emerged as one of the leading ADR choices among the defense industry. With the number of disputes being taken before either the Boards of Contract Appeals or the United States Claims Court steadily rising, the DoD has begun to pursue other methods in resolving them. Unfortunately, there has not been much guidance, to either contracting officers or defense contractors, as to how to utilize ADR methods, specifically, the minitrial, in resolving disputes.

This thesis will analyze under what conditions, and for what benefit, the minitrial should be undertaken in resolving a dispute between the DoD and one of its contractors.

B. OBJECTIVES

This thesis has two principal objectives. They are:

1. Provide information about the minitrial explaining both how it was developed and how it has been utilized in the past. This will also include specific details on the makeup of a "typical" minitrial, including its advantages and disadvantages.

2. Establish the applicable criteria to be used in deciding whether a minitrial would be beneficial in resolving disputes between the DoD and one of its defense contractors.

C. RESEARCH QUESTIONS

1. Primary Research question

   Under what conditions, and for what benefit, can ADR minitrials be utilized to successfully resolve DoD disputes?

2. Subsidiary Research Questions

   a. What types of disputes are most adaptable to minitrials?

   b. To what extent is the minitrial being used in contract dispute resolutions?

   c. What have been the barriers to implementation of the minitrial?

d. What are the cost and time savings associated with implementing, where applicable, the minitrial?

D. SCOPE

The scope of this thesis is to provide background, references, and recommendations so that DoD contracting officials can make intelligent decisions as to when minitrials could and should be utilized.

The areas focused upon included:

1. Background on the history and requirements of the CDA, including the Board of Contract Appeals and the U.S. Claims Court.

2. Basic definition of ADR and its three primary mechanisms.

3. Identification of the specific ADR method known as minitrial. This method is defined and its process analyzed and explained utilizing actual examples.

4. Development of criteria which provides a basis for determining the applicability of using a minitrial in DoD contract disputes.

The areas which were excluded included the following:

1. There was no in-depth analysis of other ADR methodologies, including those hybrid models previously used by the Department of Defense or other Federal Agencies.

2. There was no attempt to imply that every, or for that matter any, contract dispute is identical. Every case is unique, therefore, the contracting officials need to utilize good sense and sound business judgment. (Of course, some legal advice from the agency's legal department should also come into play!)

3. There was no attempt to generate empirical data. Only existing data and information were utilized for this thesis.

E. LIMITATIONS AND ASSUMPTIONS

This study is limited by its lack of empirical data relating to DoD contract disputes, or for that matter, any Federal Government Agency disputes. There are data and evidence dealing with the successes of the minitrial when used by the private sector, however, the actual examples of Government use are minimal. Therefore, the recommendations and conclusions were developed using primarily non-empirical data.

Additionally, this thesis was written under the assumption that the reader has a need for an ADR guide to the minitrial, and its potential uses for DoD contract disputes. Additionally, it is assumed that the reader has legal expertise or has such expertise available.

F. LITERATURE REVIEW AND RESEARCH METHODOLOGY

The literature search concentrated on information available from private and public agencies that specialize in ADR research and advocacy. Approximately 100 books, articles, reports, and hearings were reviewed during the course of this research. Of these, 35 were actually referenced. Almost all

of the research and data were provided by practitioners and consultants in the ADR arena and included:

1. Law and textbooks on the different ADR methods.

2. Current magazine articles from mostly business and legal publications.

3. Research papers and several studies done mostly by or for Government agencies. These included the U.S. Army Corps of Engineers and the Department of Justice. Numerous documents were obtained from the ADR source book published by the Administrative Conference of the United States.

4. Training materials published by the Corps of Engineers and several private contracting organizations.

5. Hearings on the use of ADR held by the Judiciary Committee in the House of Representatives.

G. ORGANIZATION OF STUDY

Chapter I presents the basic research questions, methodology, scope, limitations, and assumptions of the study. Chapter II summarizes the literature and focuses on the Contract Disputes Act, alternative disputes resolution, and the definition of a minitrial. The minitrial technique is further broken down in Chapter III, with an in-depth presentation of its advantages, along with specifics as to when it would not be practical to utilize. Chapter IV is an analysis of what conditions are necessary in order to produce success and when a minitrial would be beneficial for the Department of Defense. The final chapter presents conclusions and recommendations concerning ADR and the minitrial.

II. LITERATURE REVIEW-GENERAL

A. BACKGROUND

Statistically, civil and criminal Government contract litigation has exploded from a specialty into an established field of practice within the last fifteen years. For example, in fiscal year 1990, the Armed Services Board of Contract Appeals (ASBCA) docketed just over 2,000 new appeals, a 225 percent increase over new appeals docketed in fiscal year 1980. [Ref. 33:p. 4] The United States Claims Court has encountered a similar rise in the number of cases. Additionally, the American Bar Association's Public Contract Law Section reflects this expansion by an increase in membership of over 50 percent in the latter part of the 1980's. Coupled with the tremendous growth of the private bar is an equally impressive growth in the Government sector.

The growth in Government contract litigation has been fueled, in large part, by the myriad of procurement regulations and laws. Changes in the procurement arena such as the Competition in Contracting Act (CICA) along with corresponding changes in the Federal Acquisition Regulation (FAR) and agency supplements have further added to the need for additional attorneys. Also, the Defense Contract Audit Agency (DCAA) has greatly expanded its ranks of auditors

responsible for ensuring compliance with the new procurement laws and regulations, further complicating the equation. [Ref. 3:p. 2]

Among the new laws that have increased Government contract litigation is the creation of the position, Office of Inspector General. This individual is tasked with the job of ferreting out fraud, waste, and abuse, however manifested. [Ref. 25:p. 293] The net result is a completely new climate in the Government contract field, highly adversarial, and very litigious.

The relationship between the Government and the contractor has deteriorated, in many cases, from one of partnership, to one of adversaries. Even the Packard Commission concluded its lengthy study by stating, "nothing merits greater concern than the increasingly troubled relationship between the defense industry and the Government." [Ref. 24:p. 9] Also, the unprecedented peace-time increase in the defense budget during the 1980's, coupled with the cut-throat drawdown of the 1990's, must be included as causative factors. Together, these divergent forces have contributed to the tremendous growth in Government contracts litigation, and the need for an alternative method to resolve disputes.

B. CONTRACT DISPUTES ACT

When discussing the use of Alternative Disputes Resolution (ADR) in the context of Government procurement, the Contract

Disputes Act of 1978 (CDA) must first be explored. The CDA created a uniform dispute resolution process applicable to acquisition contracts entered into by executive agencies. The term "executive agency" is defined as including wholly owned Government corporations, of which there are thirteen. [Ref. 34:p. 602(a)] The CDA process is mandatory, since the FAR requires that a disputes clause incorporating the CDA procedures be included in all agency acquisition contracts.

The CDA process is fairly straightforward. The CDA requires that the contractor involved in a Government contract dispute obtain a final decision from the contracting officer. The contractor can then appeal to either (1) the appropriate Board of Contract Appeals (BCA) or (2) the United States Claims Court. Appeal from a decision of a BCA or the Claims Court lies to the U.S. Court of Appeals for the Federal Circuit, but the United States can only appeal from the BCA if the agency head so decides and the Attorney General approves. [Ref. 4:p. 67-69]

The first step in the CDA process is to attempt to negotiate and settle the dispute. If negotiations fail, the next step is to seek a final decision from the contracting officer. For claims involving $50,000 or less, that decision must be made within sixty days of when the claim was filed. [Ref. 34:p. 605(c)(1)] In situations where the claim involved is more than $50,000, the contracting officer need only decide within a "reasonable time," but must inform the contractor

within sixty days of receiving the claim how long that reasonable period will be. [Ref. 34:p. 605(c)(2)] The contracting officer's findings of fact are not binding in any subsequent proceeding. The final decision must be in writing, stating the reasons for the decision and informing the contractor of his or her right to appeal. [Ref. 34:p. 605(a)]

After receiving the contracting officer's final decision, the contractor can appeal to the appropriate BCA within ninety days. Appeals to the Claims Court must be made within one year. [Ref. 34:p. 606] Both forums have similar discovery procedures and the same remedies. However, an important advantage to appealing to the appropriate BCA is that, in the case of claims of $50,000 or less, the CDA imposes deadlines on the BCAs. For claims involving $10,000 or less, ("small claims") the contractor may elect an expedited procedure that requires a single Board member to issue a decision within 120 days whenever possible. [Ref. 34:p. 608(a)] There is no judicial review available on a small claims decision. For claims involving $50,000 or less, the contractor can elect an accelerated procedure, in which appeals are to be resolved within 180 days, whenever possible. [Ref. 34:p. 607(f)]

Board of Contract Appeals members are appointed and serve in the same manner as administrative law judges. Resolutions of BCA disputes is to be "informal, expeditious, and inexpensive." [Ref. 34:p. 607(b)(1)] Any appeal from the BCA's decision to the Federal Circuit must be taken within 120

days of receipt of the BCA decision. Appeals to the Federal Circuit from the Claims Court must be brought within thirty days. Findings of fact, but not law, are final and conclusive if supported by substantial evidence. [Ref. 23:p. 3]

Notwithstanding the Congressional objective of providing an inexpensive alternative such as the BCAs for litigants to pursue appeals, the highly judicialized rules of practice and procedure used by most BCAs and the complex nature of many Government contract claims has eroded this objective to the point that appeals at the Boards often take as long, if not longer, than many courts. [Ref. 18:p. 54] For example, in most appeals before the BCAs, the litigants are given extensive discovery rights that include written interrogatories, and oral dispositions. [Ref. 5:p. 96] The documents found in discovery are then, in part, added to the already existing appeal file or administrative record prepared by the contracting officer by way of exhibits or supplements to the appeal file. The only limitation placed upon discovery is relevancy. The administrative record becomes even larger during a hearing on the merits when testimony and exhibits are admitted into evidence. Administrative judges have been known to allow marginally relevant evidence into the record, despite objections on grounds such as hearsay, repetitiveness and relevancy. [Ref. 5:p. 104] After an often voluminous record is closed, the litigants prepare extensive and detailed post-hearing briefs and reply briefs. The briefs are usually a

lengthy discussion of the facts with extensive legal arguments following. A decision by the Board may take up to a full year or even longer in some instances, after the administrative record closes. [Ref. 18:p. 57]

Another factor to consider is that the ever-expanding Government contracts bar has begun to use novel and unconventional legal theories before the BCAs. These approaches had not been previously used in the field of Government contract law and their injection further impeded the CDA's objective of a practical, informal, and expeditious method of resolving disputes. [Ref. 9:p. 39]

Under the CDA, contractors and the contracting officer are theoretically given wide latitude to negotiate a resolution after a contractor has submitted a claim. There are some restrictions imposed on a contracting officer's ability to settle a claim, such as Agency approval, and oversight by the General Accounting Office, the Office of Inspector General, and Congress. [Ref. 29:p. 44] However, at the claim stage, these limitations are not as great of a constraint to settlement because the contracting officer is still very much in control of the claim. The only difficulty with settlement at this stage is trying to overcome the contracting officer's rationalization of an earlier decision.

Once an appeal has been filed with the BCA or Claims Court, the parties tend to become entrenched in their positions. Contracting officers are sometimes reluctant to

settle a claim after an appeal is filed with a BCA because accountability usually militates against settlements on any ground except legal liability. [Ref. 19:p. 30] According to a spokesman at the Civil Division of the Department of Justice,the Government cannot settle a case simply to save litigation expenses. [Ref. 29:p. 46] Moreover, agency attorneys are now taking a more active role, further sensitizing the contracting officer from overstepping his or her authority or acting without superior's approval. Finally, in actual practice, contracting officers tend to "hold out" any settlement discussions until discovery is nearly completed, because they know that the cost of discovery is a strong incentive for the contractor to settle, while not such an important factor for the Government.

The mere fact that an appeal has been filed often signals a breakdown in the negotiation process, and the probable hardening of positions of all parties. It is precisely at this stage, before filing an appeal, where the greatest flexibility and latitude for settlement exists. [Ref. 20:p. 21] The parties have not yet incurred significant litigation costs, nor have they escalated the dispute to their superiors or actively sought legal assistance. However, the dispute has "matured" to the extent that each party usually understands the strengths and weaknesses of their own case. It is at this point, not after the appeal has been filed, that ADR should begin.

C. ALTERNATIVE DISPUTES RESOLUTION

Alternative disputes resolution refers to a "broad range of mechanisms and processes designed to assist parties in resolving differences. These alternative mechanisms are not intended to supplant court adjudication, but rather to supplement it." [Ref. 31:p. 1] While use of these mechanisms have grown, especially in the last ten years, Americans have been resolving disputes privately for centuries. Historians have traced the use of ADR as far back as the 1660's when it was utilized by the Puritans. During the 1880's it was used by many of the Christian utopian communities. Also, during the same period, Jewish immigrants from Europe had their own tradition of resolving conflicts outside the established legal system. "The Dutch in colonial Amsterdam, the Scandinavians in the Midwest, and the Chinese on the West Coast, also employed private ADR as a vehicle of ethnic solidarity. [Ref. 12:p. 18]"

Alternative disputes resolution provides an opportunity to resolve conflicts creatively and effectively utilizing the process that best handles a particular dispute. It is useful for resolving many disputes that never get to court, provides a means of settling 90 to 95 percent of the cases that are filed in court, as well as preventing disputes from developing. [Ref. 12:p. 24]

Today's models for ADR were developed during World War II where grievances arising under collective bargaining

agreements were handled. These grievances were assisted by the American Arbitration Association or the Federal Mediation and Conciliation Service. [Ref. 31:p. 3] From these circumstances and historical events, four goals of the alternative movement emerged: (1) to relieve court congestion, as well as undue cost and delay; (2) to enhance community involvement in the dispute resolution process; (3) to facilitate access to justice; and (4) to provide more "effective" dispute resolution. [Ref. 31:p. 4-5]

There are three primary ADR mechanisms and processes that are utilized depending upon the type of complaint, the parties involved, and the settlement desired. They are as follows:

1. Arbitration

This is a private, voluntary process where a neutral third-party decision maker, usually with specialized subject expertise, is selected by the disputants and renders a decision that is binding. Arbitration can also be a compulsory, non-binding process which must be done before going to court. Each party has the opportunity to present its proofs and arguments at the arbitration hearing which is less formal than a court of law. [Ref. 7:p. 9] In compulsory, non-binding arbitration (often called court-annexed arbitration) if the parties accept the award as a judgment, the litigation is terminated. If one of the parties rejects the award and

demands a new trial, nominal sanctions may be imposed on the requesting party. [Ref. 7:p. 11]

2. Mediation

Normally this is a private, informal process where a party-selected neutral assists disputants in reaching a mutually acceptable agreement. In mediation, the primary responsibility for the resolution of a dispute rests upon the parties themselves. [Ref. 11:p. 218] The mediator at all times should recognize that the agreements reached in negotiations are voluntarily made by the parties. It is the mediator's responsibility to assist the disputants in reaching a settlement. At no time will a mediator coerce a party into agreement nor attempt to make a substantive decision for the parties. [Ref. 11:p. 234] A mediator must remain neutral and impartial, free from bias or favoritism.

3. Negotiation

Usually an informal, voluntary unstructured process used by disputants to reach a mutually acceptable agreement. At the option of the participants, the process may be kept strictly private. There is no third-party facilitator, although the parties may appoint individuals such as attorneys to represent them in the negotiation, if desired. No limits are placed on the presentation of evidence, arguments, or interest. [Ref. 28:p. 17-19]

These three processes, arbitration, mediation, and negotiation are often combined in various ways to produce another set of ADR mechanisms. One such "creation" (and the subject of this paper) is the minitrial!

D. MINITRIAL DEFINED

The minitrial has been defined as a nonjudicial, abbreviated presentation of each party's case to one representative of each of the disputants. [Ref. 1:p. 169] These representatives, or principal participants, will attempt to negotiate a resolution of the dispute both during and immediately following the hearing. The principals are unique in that they have been vested with sufficient authority to unilaterally resolve the dispute at hand. By selecting their own principals as the decision makers, the parties retain full control over resolution of the dispute, instead of submitting it to a third party (court or board) for decision. The parties may elect to employ a "neutral advisor," either a legal or technical expert depending upon the requirements of the particular case, to assist the principals in negotiating a settlement. Typically, the minitrial consists of a short hearing (not more than two or three days) and period of negotiation (not more than fifteen days) following a brief period of discovery. Ideally, the entire minitrial process can take place in about ninety days following the execution of the parties' agreement for minitrial. The agreement document

is highly specific to the requirements of the subject minitrial, and may require a planning period of some weeks to properly draft. The planning period should not be neglected or underemphasized, for the parties should form an agreement that best reflects the needs of the case at hand, and establish a hearing and decision making process which is both expeditious and complete.

In summary, the minitrial is a private, consensual proceeding where counsel for each party to a dispute makes a shortened presentation of his or her case before the top official with settlement authority for each side, and usually, a neutral third-party advisor. Minitrials share the following characteristics: [Ref. 16:p. 45-47]

1. Parties negotiate a set of procedural ground rules (a protocol) that will govern the non-binding minitrial.

2. Time for preparation is relatively short (between six weeks and three months) and the amount of discovery is relatively limited.

3. Hearings are usually no more than two days.

4. The case is presented to representatives of the parties with authority to settle.

5. Immediately after the hearing, the representatives meet privately to negotiate a settlement.

6. If a settlement cannot be reached, the neutral advisor may render an advisory opinion on how he or she thinks a judge would rule if the case were to go to court.

7. The proceedings can be confidential.

Appendix A is an example minitrial agreement published by the Department of Justice (1992).

E. CHAPTER SUMMARY

This chapter first discussed the tremendous growth in Government contract litigation during the past decade. It then provided background on the Contract Disputes Act of 1978: both its history and its methodology. Alternative Disputes Resolution was then explored via a definition and examples. Those examples were arbitration, mediation, and negotiation. From these three primary methods, a hybrid method of resolving disputes was introduced. That method, the minitrial, was defined and its seven distinct characteristics were provided.

Chapter III will provide extensive literature review as to both the advantages and disadvantages to the minitrial.

III. LITERATURE REVIEW-MINITRIALS

A. BACKGROUND

Minitrials are no longer a novelty or aberration. To the contrary, among those who have used the minitrial to settle disputes are some of America's most respected corporations. The list includes Allied Corporation, Amoco, Austin Industries, Continental Can, Control Data Corporation, Gillette Company, Shell Oil Company, Union Carbide Corporation,and Wisconsin Electric Power Company. Moreover, the types of disputes settled through the minitrial process are varied; they include contracts, antitrust, product liability, insurance claims, construction, trade secrets, and employee disputes. [Ref. 32:p. 89] The minitrial has proved its worth not simply as a theoretical technique, but as a practical device of widespread, including Department of Defense, utility.

The minitrial has seven distinct advantages over conventual litigation when it comes to resolving business disputes. Those advantages, with specific business examples, follow and also include appropriate applicability to Department of Defense contracting.

B. ADVANTAGES

1. Saves Money

There is no statistical repository for legal expenditures, either in conventional litigation, or in the ADR arena. However, there are numerous examples where the cited savings in legal expenses are in the tens of thousands of dollars. Austin Industries, Inc., a large Dallas-based construction company, has used the minitrial to settle rancorous construction disputes at a savings of some 97 percent of normal litigation costs. [Ref. 20:p. 23] Unlike most minitrials, the Austin minitrials gave a two week breather between presentations of each case. The neutral advisor was then required to issue a report on what he thought the outcome would be if the case were to go to court. The parties settled on the advisor's term within about two months. J. David McClung, Austin's general counsel, states that his rule of thumb is that anyone who litigates loses. [Ref. 20:p. 24] For that reason, he has often proposed minitrials in the midst of a dispute, and in fact "just the suggestion has several times facilitated settlements." [Ref. 20:p. 25]

The major component of savings in minitrials lies in the drastic reduction of hours that would otherwise have been expended on pretrial discovery and on the trial itself. The pretrial itself, since it involves the collection of so much peripheral information, can last for years. Costs associated

with it include hourly billings of lawyers and staff, travel, and duplicating services. The trial can last for days, weeks, and in most complex cases, for months. The trial time of lawyers is always billed at top dollar, and if the court is away from the lawyers' principal offices, travel and hotel costs are likely to be considerable. Even when the trial is over, costs can continue to climb precipitately. This is because most sizable business disputes, and many smaller ones, are later appealed; a whole new undertaking that can itself take several years. [Ref. 30:p. 214]

By contrast, the lengthiest minitrial will consume only several weeks of lawyers' time, virtually all of it spent on tasks that would have had to be undertaken anyway if the case had gone to trial. Moreover, because the preparation process forces the lawyers to narrow the issues and sharpen the focus of the dispute, it may actually save money in the event that the minitrial proves unsuccessful. This is due to the fact that the lawyers will be able to prepare more efficiently for trial. [Ref. 21:p. 79-80]

The American Can Company-Wisconsin Electric Power Company minitrial is an example of how the preparation process provides direct focus for a case. American Can sued Wisconsin Electric for $41 million for breach of contract over the use of industrial waste it was selling to Wisconsin Electric as boiler fuel. Wisconsin Electric counter sued for $20 million, claiming that its costs in burning the wastes were $20 million

more than it was contractually obligated to pay. [Ref. 15:p. 114] The technical issues were numerous and intricate. It was estimated that the trial would take at least seventy-five days in court. Seven months into the discovery, the parties decided to attempt to settle through a minitrial, and signed on as their neutral advisor former Federal district Judge Harold R. Tyler, Jr. [Ref. 15:p. 115]

Before the three-day hearing, the lawyers supplied Judge Tyler and the business representatives with several hundred exhibits and brief summaries (fewer than thirty pages for each side) of the parties' arguments and positions. As Robert H. Gorske, vice-president and general counsel of Wisconsin Electric, later stated, the abbreviated hearing forced the parties to focus in a way that rarely happens in court:

> Although the basic case and the counterclaim were both extremely complex, the neutral advisor and his fellow panel members had by the end of the oral argument period on the third day, a complete grasp of what the significant points of the two sides were. Further, all those present had a better understanding of the arguments of each side and how convincing they were. This kind of result is extremely difficult (but not impossible) to achieve in the usual procedure in which the trial counsel reports to his client management about such matters. [Ref. 15:p. 116]

Over the next several days, the parties met alone and with Judge Tyler, who candidly evaluated the various arguments and said what he thought the chances of ultimate success in court would be. In three months, the case was settled through private negotiations between the company representatives,

eliminating the seventy-five trial days and many months of protracted discovery.

The only costs in these proceedings that would not be borne at trial are the immediate costs of the information exchange and the neutral advisor. [Ref. 13:p. 29] Since the information exchange portion of the minitrial lasts two or three days, the time involved is minuscule. The neutral advisor is paid either an hourly fee (which could be as high as $350 or $400 or more for top-flight professionals), or a negotiated flat fee, which might go as high as several thousand dollars. [Ref. 30:p. 252] Against the total cost of the case, this fee is relatively inexpensive, and it is usually divided equally among the parties. Moreover, in many trials, expert witnesses will command similar fees (both for testifying at trial and for helping the parties prepare for trial), and these fees are often avoided altogether if the minitrial is successful.

Using a best-guess estimate, the minitrial of a complex business dispute may result in a nonrecoverable cost to the business and the Government of between $10,000 and $20,000. The disputants will not be able to recoup this money if the minitrial fails and they eventually wind up in court. But against the costs that would be incurred without ADR, this is a tiny expense, well worth the risk. [Ref. 16:p. 49]

2. Preserves Business Relationships

Minitrials have invariably preserved important working relationships, relationships that are typically lost in the acrimony of litigation. This preservation has often been cited as the most important result of successful minitrials. [Ref. 35:p. 2] This becomes even more of an important factor when considering that many of the DoD contracts are with sole source contractors. No one benefits if the relationship crumbles as a result of litigation.

An example of a relationship that avoided permanent ill-feelings was that of Control Data Corporation. [Ref. 17:p. 42] Contractors built the company's corporate headquarters in Minneapolis with a fourteen-story glass wall that leaked whenever it rained. Rather than immediately suing, Control Data tried to talk the various participants in the fiasco into repairing the flaw. However, two of the large contractors and a host of other subcontractors declined to provide any remedy. Finding no alternative, Control Data sued all of them for the several million dollars it would take to make the repairs.

The problem was that everyone pointed a finger at everyone else, and several fingers pointed back at Control Data, which ironically does considerable construction work around the world. At an early meeting with lawyers for several of the parties, Control Data's general counsel suggested using some form of minitrial. [Ref. 17:p. 43] Rather than start up what promised to be a round of massive discovery, the principal

parties--Control Data, the architects, and the builders--agreed to try the process to apportion liability among themselves; they avoided involving the subcontractors at that stage.

Each of the three groups appointed a senior manager with full authority to settle the case. Each side had seventy-five minutes to present its case and to question the others. Initially, the parties' lawyers specified that neutral outside engineers, architects, and a lawyer would sit with the managers. However, the managers later decided to eliminate these neutrals in an attempt towards simplicity.

Following the five-hour presentation, the managers met and talked. After about ninety minutes, a settlement emerged. It involved the payment to Control Data of several million dollars and an arrangement that would permit the contractor and the architect to replace the outside of the building piece by piece, at their expense, over a three year period. The solution was "eminently fair and practical," said Control Data's general counsel, who noted that it was a more flexible arrangement than a court would have been able to construct. [Ref. 17:p. 44] Following this agreement, the contractor and the architect negotiated for about three months to secure contributions from the subcontractors.

The net result of the process, Control Data's general counsel concluded, was to preserve the business relationships. "We will use these contractors and these architects again," he

said at the time of the settlement. [Ref. 17:p. 43] "I can guarantee you as the person who makes those decisions that if we had gone to court with them, further business relationships would have been very difficult to maintain. [Ref. 17:p. 45]" Because they did resolve their differences, Control Data was amenable to employing these same architects, contractors, and builders in future projects. This is an example that the Government should keep in mind as it wrestles with the shrinking Defense Department industrial base. The number of companies to "choose" from is dwindling; therefore maintaining and nurturing the existing and successful business relationships is critical.

3. Allows Selection of a Knowledgeable and Neutral Advisor

In Federal courts and many state courts, judges are selected to preside over a particular case through a random drawing. The judge's experience and knowledge do not enter into the selection. A judge with no patent or antitrust experience may find himself presiding over a complex patent-antitrust case as easily as a judge with prior experience. [Ref. 10:p. 670] The minitrial process permits the parties to choose their own neutral advisor, one who is known to be well equipped to deal with the technical, legal, scientific, and other esoteric issues in the specific case.

In a recent minitrial involving a major construction company and a utility, the use of a respected engineer as neutral advisor gave credibility to the decision for the power utility, which might otherwise have balked at settling. [Ref. 14:p. 117] This advisor selection is especially crucial in military contracts where the multitude of regulations make even the simplest buy a complex procurement. The advisor needs to be well-versed in the myriad of Government acquisition and contracting policies. If not, the minitrial is doomed to failure.

4. Enables Parties to Design Process

The minitrial enables the parties to design their own process rules. This is a decided advantage over litigation, whose formal rules of procedure and evidence can distort issues and lead the litigants into a blind alley. [Ref. 2:p. 18] A set of rules tailored to the type of case and the personalities of the key participants can make the proceeding efficient, limit the time that needs to be spent at the hearing, and relieve the frustration that comes from being unable to put forward a coherent case all at one time.

5. Allows Creative Problem Solving

The minitrial greatly enhances the opportunity for a "win-win" resolution of the dispute that is dividing the parties. In courtroom litigation, the judge is bound to make a ruling on the law that usually will give an "all or nothing" verdict

to one side. There is precious little room for compromise, because the judicial forum does not operate as a negotiator, but as an adjudicator of legal rights: either the plaintiff has a legal right to what it asks, or it does not. [Ref. 9:p. 128] Moreover, what is relevant in the courtroom are only those facts and circumstances directly relating to the case at issue. In a termination for default case, for example, judge and jury will consider whether there was a legally binding contract, whether it was breached, and what damages were suffered. [Ref. 8:p. 84] They will not be interested in whether the plaintiff and defendant are parties to other, unrelated contracts. However, they should be interested because when two organizations have ongoing relations, there is almost always a way of bringing other aspects of the relationship into the picture to effect a compromise, if they try to do so outside of the courtroom.

A dramatic example of this extrajudicial compromise is the Texaco-Borden minitrial. [Ref. 27:p. 2] In May 1980, the Borden Company filed a $200 million antitrust suit against Texaco, Inc. in connection with a natural gas contract in Louisiana. Both sides were initially confident of their claims and defenses, and so the lawyers dug in their heels. For example, Texaco lawyers expended many thousands of billable hours, and the company produced some 300,000 documents during discovery. So complex was the case that the Federal district judge scheduled a preliminary jury trial two

and a half years later merely to "interpret the contract" in the hope of limiting discovery. [Ref. 27:p. 3]

A few weeks before the November 1982 trial date, Borden counsel H. Blair White discussed with Texaco general counsel William Weitzel, Jr. the possibility of a minitrial. They established simple ground rules. The parties would meet on neutral ground and argue the case before executive vice-presidents of each company (James Kinnear of Texaco and Robert Gutheil of Borden). The lawyers would each have an hour to present their cases, plus time for rebuttal, though, as White put it, "no one was holding a stopwatch. [Ref. 27:p. 5]" Each company was also permitted to have advisors other than lawyers. Texaco had present a Louisiana operations manager, and Borden had high-level operations and financial experts.

The hearing went smoothly, but the private discussions over dinner between Kinnear and Gutheil did not. Gutheil wound up pressing for even more money than White had demanded, and Texaco's Kinnear was so convinced of his position that he "was reluctant to assign even nuisance value to Borden's claim. [Ref. 27:p. 6]" In fact, Kinnear contemplated pressing counterclaims against Borden.

At this point the outcome looked dim, but the parties did not break off negotiations. They agreed to talk by telephone in a few days, and these conversations led to still others. Their persistence paid off: within a few weeks the dispute was resolved in a manner never anticipated in the litigation.

Indeed, it was settled in a manner that would never have been possible had the dispute been taken to court.

The companies wound up renegotiating a gas supply contract that had not even been at issue in the original case. They also created a new arrangement for transporting Texaco gas to Borden at prices favorable to Borden. This settlement resulted in a "nine-digit benefit" to Borden that was expected to give Texaco "positive earnings in cash flow," according to Texaco associate general counsel Charles Kazlauskas. [Ref. 27:p. 9] The resulting contracts enabled both Borden and Texaco to claim victory. "That is truly a win-win situation, which we never expected," Kazlauskas stated. He noted that the parties learned five basic lessons from the experience: [Ref. 27:p. 10-12]

1. The litigation pending in the background provided a strong incentive for settlement.

2. The mutually beneficial settlement could never have been achieved in court, however, because courts lack the power and expertise to fashion a complex remedy involving far more than the simple payment of money. Lawyers acting alone probably would not have been able to devise such a settlement. "The magic was the creativity of two extremely knowledgeable businessmen who recognized each others' strengths and weaknesses. By repositioning these business realities, they were able to make both sides winners."

3. The results could not have been produced without the lawyers. Without their "persuasive presentations," the executives would never have fully recognized the hazards of litigation, such as the ambiguities of documents and other evidence.

4. The settlement dramatically changed the companies' working environments. What had been a tense adversary

environment was transformed into an attitude of cooperation.

5. The settlement was achieved without the anticipated immense expenditure of money and time, without the business disruption that would have ensued had the trial gone forward (and without the almost inevitable appeals and potential retrials).

Kazlauskas concluded by stating: "I think the minitrial alternative should always be considered when a potentially complex business dispute arises, especially in inter-firm disputes between Fortune 500 corporations. [Ref. 27:p. 13]"

By taking their differences to a minitrial, both companies were able to bring into the picture their other contracts, and to work out a deal that made economic sense to both. They were able to expand their opportunities by considering their entire business relationship. This relationship that is so critical between commercial business entities is just as critical as the relationship between the Department of Defense and its contractors. The whole picture needs to be considered, not just one blip. Therefore, before DOD "goes after" a contractor, its future relationship with that contractor needs to be addressed.

6. Maintains Confidentiality

Very few companies want to publicize an alleged mistake or a dispute with an important business partner. Unfortunately though, formal litigation that reaches the courtroom, takes place in the proverbial fish bowl. The courtroom is open to

the public, which for important business cases means an inquiring press; in a big enough case, it seems the whole world will know the intimate facts. This is especially true anytime Defense Department dollars are involved. The press has a field day with cases involving "your tax dollars." Also, disclosure of sensitive facts is not limited to what is spoken in the courtroom itself; most documents produced in a case and introduced in court are available for outside inspection. [Ref. 14:p. 120]

This is not the case with the minitrial. The parties can operate under tight secrecy rules drawn up by themselves. Nothing needs to be disclosed before, during, or after a successful minitrial. The proceeding itself is held in secrecy: no outsider need be invited; indeed, no outsider even needs to know that it is taking place. Documents remain the property of the parties, who retain them when the hearing is over. The neutral advisor is pledged to say nothing about what he hears (and sometimes even to refrain from saying that he served as a neutral advisor), and he is barred from serving either party as an expert witness or in any other capacity in connection with the particular case. [Ref. 14:p. 122]

This was the situation when two major oil companies used a minitrial to settle a $28 million claim for cost overruns on the construction of a supertanker. [Ref. 13:p. 30] One of the oil companies was buying a pair of Alaska oil trade tankers; the other company owned the shipyard that was late in making

them. Although the parties were barely on speaking terms, they hesitated to go through a projected five years of litigation, and they especially feared the attendant publicity. So they presented their cases in six hours before a three-member panel: the president of the shipyard, the general counsel of the shipyard's parent company, and a vice-president of the buyer. The settlement came about two weeks after the six-hour hearing, and the customer got about half of what it demanded. The parties stated that they were impressed with the process, but they still would not disclose their identities! [Ref. 13:p. 32] This of course is a luxury they would not have been permitted had they wound up in court.

This area of confidentiality is still up in the air when it comes to Government contracts. There is still debate as to whether the Freedom of Information Act (FOIA), or some portion thereof, apples to any "judgment" involving tax dollars. No settlements and/or results involving the DoD and a minitrial have been challenged under the FOIA, however, that is not to say that in the future, a settlement that was to remain "closeted" will end up having to be publicized.

7. Saves Time

A business executive speaking to the annual conference of the judges of the Ninth Circuit Federal Court of Appeals described justice as the right of a corporation to have its "decade" in court. [Ref. 10:p. 668] In a fast-moving business

environment, dispute resolution measured in weeks and months is far superior to litigation measured in years. The biggest cost of litigation increasingly cited by business leaders is lost business opportunities. The opportunities are lost because of the shadow of litigation that makes executives hesitant to act until it is settled. [Ref. 1:p. 170]

Compared to formal litigation, the time preparing for the minitrial is slight indeed. Most corporate lawsuits require months of preparation at a minimum, and years when the case is complicated. Protracted litigation can absorb an outsized allocation of management's time just in peripheral discovery. [Ref. 30:p. 118] A minitrial can be constructed and completed in a matter of a few months; the hearing itself will last two days, rather than weeks or months. In a minitrial, the time required of key managers, even though they play the dominant role, is quite limited.

C. DETERRENTS

In the early 1980s, many top corporate lawyers would meet periodically to talk about alternative disputes resolution, and the chief topic of conversation was the minitrial. [Ref. 10:p. 669] They worried then as they do today: will their suggestion to the CEO and top management that the company try to resolve a dispute through ADR be greeted with skepticism? Would they be viewed as soft-headed and weak? [Ref. 10:p. 671] John Stichnoth, general counsel of Union Carbide Corporation,

and one of the earliest proponents of ADR, counseled many of his brethren about jumping too fast because the "wrong case" could ruin ADR's chances within a particular company if the lawyers resorted to it under adverse circumstances and found it wanting. [Ref. 12:p. 43] Managers may permit themselves to be talked into an experiment, but they will not be likely to repeat a novelty if it goes wrong the first time.

With that in mind, there are times when the minitrial could not, or should not, be a substitute for a lawsuit. The following are those circumstances under which a minitrial might not be an appropriate means of resolving a legal dispute.

1. Unfamiliarity

Perhaps the single biggest deterrent to the use of the minitrial is a lawyer's lack of familiarity with the process. [Ref. 28:p. 38] Although there has been considerable comment on the minitrial within legal circles in the 1980s, only a relatively small percentage of the practicing bar has any knowledge of the minitrial and its success record. [Ref. 7:p. 8]

The lawyer's unfamiliarity is not inevitably a deterrent, however, as the Gillette trade secrets minitrial demonstrates. [Ref. 28:p. 41] A Gillette employee quit his job to join another company, allegedly taking with him trade secrets involving writing instruments (otherwise known as pens!) that

Gillette manufactured. The employee joined a competing manufacturer, which quickly brought a similar product to market. Gillette sued, claiming theft of trade secrets and patent infringement.

From the very outset, Joseph Mullaney, Gillette's senior vice-president and general counsel, sought a way to short-circuit the litigation. A telephone call from Gillette's divisional vice-president to the competitor's president (who coincidentally had also once worked for Gillette) failed to lead to a settlement. The competitor was prepared to file an antitrust counter suit. When Mullaney suggested a minitrial, his counterpart was quick to agree. The only dissenter was Gillette's outside lawyer, who peppered Mullaney with objections claiming that the minitrial could not possibly work. [Ref. 28:p. 44] Additionally, the outside lawyer presented Mullaney with a lengthy memorandum denouncing the minitrial protocol. "The memo was a classic statement of the traditional position that only litigation would work," Mullaney recalled. [Ref. 28:p. 45] He firmly disagreed, put his outside counsel on hold, and went forward.

The protocol provided for limited document discovery and a tight timetable for examining the parties. The two companies hoped to finish the case in four months, but the schedule slipped a bit and it took six. In the end, after listening to the lawyers' presentations, Gillette's divisional vice-president and the competitor's president met for a

morning with the lawyers and then, over lunch, reached substantial agreement. The minitrial thus avoided virtually all the expenses of litigation and settled the case in perhaps a sixth of the time that it might have taken in court.

The clear loser according to Mullaney, was Gillette's outside lawyer. In opposing the minitrial idea, "he argued that the courtroom was the only crucible for getting at the truth." As Mullaney noted, "that's rather farfetched these days. [Ref. 28:p. 46]"

2. Tactical Use of Litigation

When one of the parties is using litigation as a tactic to achieve some end other than simply winning a judgment (for instance, to gain publicity for a particular cause), the mutual consent necessary to initiate a minitrial will be lacking. Even so, the parties in many such lawsuits are also seeking a reasonable outcome, and the smart litigator might consider the possibility of gaining as much publicity value by securing an appropriate settlement through a minitrial as through a bitter court fight.

3. Deferment of Liability

It is no secret that defendants drag out many lawsuits in order to defer payment for damages they caused. Under the rules in most jurisdictions, no interest needs to be paid on many damage awards until the moment the judgment is handed down. [Ref. 25:p. 295] (By contrast, proof of a claim that the

defendant failed to make a required contractual payment will result in an award for the amount owed plus interest dating from the time the original amount was due. This is also the case in DoD contracts. [Ref. 25:p. 296]) In many jurisdictions, court ordered interest is considerably lower than real interest rates. So on both grounds, it will often pay for a defendant to defer a finding of liability and damages as long as possible. In such a case, the defendant is unlikely to agree to resolve the dispute by minitrial.

4. Trust

The minitrial requires some minimum level of trust among the professionals, both the lawyers and the managers. If feelings have reached a low ebb, mutual suspicions will be too serious to allow one side to agree to the other's suggestion that something other than conventional litigation be utilized. The refusing party will doubt the efficacy of ADR and may simply be unable to swallow a suggestion by an adversary that they engage in a cooperative venture. One possible way to break down the barriers of mutual suspicion is to have a neutral intermediary, acceptable to everyone involved, explore the possibility of structuring settlement talks. [Ref. 35:p. 5]

5. Legal Rulings

When the principal issue in a case is a strictly legal one, such as a violation of the Sherman Anti-trust Act, then

conventional wisdom holds that such cases are better left to the summary judgment procedures of the courts. [Ref. 5:p. 56] This allows for the judge to simply hear the case and make rulings based on law, and not submit the case to a jury for findings. It is not necessarily true that these "pure law" cases can never successfully be heard in a minitrial procedure. The opinion of a neutral advisor who is a retired judge or an expert in the particular field of law may tell the parties much about whether it makes sense to continue the case or to reach a compromise based on the advisor's opinion.

For example, when Honeywell and Telecredit engaged in a dispute about the meaning of a contract provision involving payment of a $100,000 license fee, the facts were undisputed. The dispute turned on whether a particular clause in the contract required Honeywell to make one payment or two before exercising an option to cancel the deal. The amount in dispute was too small to take to court, so the parties designated an arbitrator to make a "legal" ruling on the meaning of the contract clause. [Ref. 4:p. 71] The parties resorted to an arbitrator because they wished the outcome to be binding. Had they not, they could as easily have had their managers listen to the debate in a minitrial format.

However, it certainly is true that there will be no consent to a minitrial if one side is litigating because it wants a court ruling in order to establish a new rule of law. In certain types of cases, the plaintiff may be seeking a

legal ruling or the reaffirmation of a policy. As an example, a public interest plaintiff may be seeking a court ruling on the meaning of an environmental statute [Ref. 26:p. 7], or the Government may be seeking to vindicate its policy of filing certain kinds of lawsuits. [Ref. 4:p. 75] When these elements are present, the plaintiff may feel that its interests are not served by a minitrial.

6. Witness Credibility

Wisdom holds that when a case revolves around the credibility of key witnesses, it will be hard to resolve through a minitrial. It has been suggested that credibility issues are inherently incapable of being resolved in an objective fashion; hence, the executives will be obliged to sort out the facts (or fantasies) after the hearing is over. [Ref. 11:p. 86] How to deal with the facts as they exist is something with which experienced negotiators can cope. How to determine the facts is not. It is always possible, of course, to show that a witness is flat-out lying, but rarely is direct evidence available. In most issues where credibility is key, the witnesses may not be deliberately lying, but rather to be stating their different (and sincerely felt) versions of the truth. [Ref. 11:p. 92] In a minitrial, this presents too sticky a situation for the executives to attempt to resolve.

7. Large Judgments

In some cases, plaintiffs seek what, to the defendant, amounts to large or even crippling judgments. When the plaintiff, or the plaintiff's lawyer, genuinely expects or at least hopes for a giant verdict, or one that would cripple the defendant, a minitrial may not work. This criterion is at best only a very general one, and specific circumstances may dictate the prudence of trying a minitrial anyway. The size of damages is relative to the size of the company, its assets, revenues, business prospects, and the risk that others will bring similar claims. Moreover, the mere demand for large damages does not prove a strong belief by the plaintiff in the likelihood of recovering them, and the minitrial setting may provide both sides an opportunity to see that the issues and claims can be negotiated. [Ref. 16:p. 49]

8. Need for a Jury

Some plaintiffs will want their cases heard by a jury in the first instance, because they suppose that the particular facts (such as the nature of the injury in a personal injury case or that the big, bureaucratic DoD was insensitive to the feelings of the "innocent" small contractor) may make their claim especially compelling to a jury. [Ref. 19:p. 38] Even here though, it is possible to convince a plaintiff's lawyer otherwise, if for example, there is concern about bankrolling

a suit against a large company (or the Government) with tremendous financial staying power.

D. CHAPTER SUMMARY

Chapter III provided the background on the minitrial, including its advantages and disadvantages. The seven advantages were that it saved money, preserved business relationships, allowed selection of a neutral advisor, enabled the parties to design the process, allowed for creative problem solving, maintained confidentiality, and saved time. On the other hand, the minitrial would not be advantageous when the participants are unfamiliar with the minitrial process, where tactical use of litigation is desired, where deferment of liability is desired, where trust is an issue, when legal rulings are desired, where witness credibility is questioned, when large financial judgements are desired, and when there is a need for a jury.

The next chapter will discuss possible minitrial applications to the Department of Defense, and what conditions are necessary for successful resolutions of disputes.

IV. APPLICATION TO THE DEPARTMENT OF DEFENSE

A. OVERCOMING OBSTACLES

The growing movement in corporate and consumer disputes to save time, money, and judicial resources through alternative disputes resolution techniques, such as minitrials, has slowly reached the Government setting. [Ref. 3:p. 2] Exploration of this technique should be helpful since the Government has experienced the same rising litigation costs and interminable court delays as private parties. Several perceived statutory and practical obstacles have impeded the Government in using creative disputes resolutions, however, the minitrial might be just the vehicle to overcome these obstacles.

The first obstacle which makes Government contract disputes distinct from commercial litigation is the elaborate disputes resolving statutory procedures mandated by the Contract Disputes Act (CDA) of 1978. [Ref. 34:p. 601-613] The statute applies to all contracts entered into after March 1, 1979. A key provision of the statute mandates that all Government contracts include disputes clauses which set forth procedures by which disagreements relating to the contract must be resolved. [Ref. 34:p. 607(d)] The procedure requires the Government to make a final written decision concerning the disagreement with the contractor, including all the facts and

legal conclusions which led the Government to deny the contractor's claim. Upon receipt of the Government's final decision, the contractor has three options: (1) acquiesce; (2) appeal the decision to an agency board of contract appeals; or (3) sue in the U.S. Claims Court. [Ref. 34:p. 609(a)]

Whether these statutory procedures are exclusive is a question which raises an impediment to the Government's use of the minitrial technique. For example, in a recent case, the Interior Board of Contract Appeals held that the Government could not submit to binding arbitration because of conflict with the statutory procedures. [Ref. 22:p. 21] The Government's authority to settle and to devise means of settling, however, has never been doubted because in fact a basic purpose of the Contract Disputes Act is to promote more efficient resolutions of disputes.

A second serious obstacle facing Government use of expedited settlement is "the natural inclination of agency officials to follow the book, in resolving disputes, thereby theoretically avoiding Congressional and public criticism. [Ref. 23:p. 3]" A plethora of organizations outside the agency review and second-guess any settlement. Potential reviewers and possible critics include oversight committees of Congress, audit teams from the General Accounting Office (GAO), and the agency inspectors general, as well as the general public. The use of minitrials may actually ease this

problem, however. The minitrial process requires a written record clearly documenting the issues of settlement, potential litigation risks are clearly described by the legal positions set forth in the briefs, and the formality of the procedure itself may lessen criticism.

A third perceived constraint unique to the Federal contracts context is the question of settlement authority. Federal agencies have a rigid chain of command (especially the DoD) and settlements must often be approved by the legal, financial, procurement policy, and technical divisions of an agency. [Ref. 22:p. 18] Tentative settlements are often upset by subsequent internal agency review. The minitrial procedure may also alleviate much of this problem. In preparation for the minitrial, the Government is forced to define the authority of the negotiation and the acceptable negotiating position. The advance approval and "written authorization from the head of the agency, empowering the representative on behalf of the agency to reach a settlement, reduces the opportunities for overturning the settlement. [Ref. 22:p. 21]"

Finally, a related problem for the Government is the question of settlement funding requirements. A negotiating officer for the agency obviously cannot ultimately make settlement without the funds to cover the amount. Minitrial requirements in some ways relieve these problems by involving senior officials who have the authority to approve "re-allotments". [Ref. 3:p. 17] Re-allotments can be made within

the agency to cover the financial needs of a particular settlement.

B. CONDITIONS NECESSARY TO PRODUCE SUCCESS

One of the virtues of the minitrial is that it can be tailored to meet the requirements or needs of a specific dispute. Nevertheless, a minitrial will most likely succeed if certain procedures have been incorporated into the ground rules drawn up by the parties involved. Those areas that should be specifically addressed include the following: [Ref. 17:p. 26-35]

1. Negotiate Ground Rules

Since minitrials are voluntary, the parties must agree not only to conduct one, but to also provide for a set of ground rules or common procedures, often known as the "protocol," to guide the participants throughout the minitrial process. The precise rules are less important than the process of arriving at them. The key is to persuade those involved to accept the process of letting key executives with authority to settle listen to a highly abbreviated version of both sides of the case, and of then agreeing on the procedures that would best achieve the settlement goal.

The idea of a minitrial can be initiated via a lawyer, through principals involved, or through a neutral intermediary. How best to proceed depends on the stage of the dispute and its circumstances; no rule of thumb is possible.

If the dispute has not yet gone to lawyers, it is possible to contact the adversary directly and suggest a settlement utilizing a non-binding, focused procedure. If the case is in litigation, then a lawyer on one side would raise the possibility with the opposing attorney. Whatever the case, a minitrial protocol should be established and should address at least eleven concerns: [Ref. 17:p. 28]

a. Issues

Although the non-binding status of the minitrial means that one need not be concerned about rigidly enforcing restrictions on certain issues, it makes sense to have at least a general idea about which issues are to be discussed and which issues are out of bounds.

b. Discovery

In the typical case, amount of allowable discovery should be relatively limited. If the parties are in the midst of litigation, much discovery will have already taken place anyway.

c. Obligations

The protocol should obligate the parties to present their best cases and then to negotiate following the presentation of evidence.

d. Participants

The names of the business and Government principals to be present, the number of lawyers, experts, and other

witnesses should be aired and agreed upon at this time. Most importantly, the protocol should set forth the status of the representatives and state their specific authority to settle.

e. Itinerary

The ground rules should set forth the date, time, and place of the minitrial. It should also provide a schedule of events to include how much time will be allocated to the parties' direct case, to rebuttal, to questions, and so forth.

f. Evidence

No formal rules of evidence are required, however, if certain rules are to be followed (for example, no expert testimony except from experts actually present at the hearing), these should so be stated formally in the protocol.

g. Documents

It may be necessary for the parties to exchange briefs and other documents in advance of the minitrial. Again, these should be specified in the protocol, along with the appropriate timetable for their submission.

h. Neutral Advisor

A decision must be agreed to on whether to use a neutral advisor, and if so, how the selection will be made. When selected, the neutral advisor's name should be incorporated into the protocol.

i. Confidentiality

The protocol should provide for the confidentiality of all documents exchanged and statements made, and for their inadmissibility (and the inadmissibility of any opinion given by the neutral advisor) in any future proceeding. The first concern is to prevent the information divulged in the proceedings from subsequent disclosure at a trial. The second concern is to keep all news of the proceeding private, so that the dispute is not aired publicly (in other words, so the press does not find out)!

j. Costs

Agreement should be reached at the onset on how the various costs of the witnesses, neutral advisor, and any others should be apportioned. It is generally the rule that the neutral advisor's fee is divided evenly between the parties.

k. Pending Litigation

Finally a decision must be reached as to how any currently pending litigation should be handled. Usually, the parties agree to suspend discovery and to stay the litigation until the minitrial is complete and they have had some period of time to negotiate a settlement.

2. Limit Preparation Time

One of the most important factors in the success of minitrials thus far has been the limited amount of time that the lawyers and others have been allowed for preparation. Ordinarily, much of the time devoted to pretrial discovery in formal litigation is relatively non-focused. [Ref. 30:p. 218] It is a cross between a fishing expedition (hoping to catch particularly important documents) and a dredging of the lake bed (searching for everything). [Ref. 19:p. 33] As lawyers go about this task, they do not necessarily concentrate on which documents and depositions are critical. However, when the lawyers are suddenly faced with an extremely short period of time, perhaps six to eight weeks, in which to prepare the case as a whole, they and everyone else connected with the case suddenly focus on the heart of the matter. This short period is therefore crucial, because it forces everyone to do what ideally they should have done from the outset. It eliminates the inconsequential, puts the case in perspective, and short-circuits the expensive routines the lawyers had been or would be pursuing. [Ref. 30:p. 243]

Preparation time must necessarily include briefing the key executives who will be present for each party. No business or Government representative should walk into the minitrial cold, without understanding the basics of the case, the nature of the minitrial process, or what is expected once the presentations are completed.

3. Abbreviate the Hearing

The minitrial itself should be confined to one or two days. Brevity is the soul of the minitrial because it forces concentration on what actually matters. [Ref. 22:p. 15] Also, since the business and Government executives will be crucial participants in the minitrial, it would be impractical to expect them to devote an extended period to formal presentations. Moreover, if the minitrial were allotted more time, there would be a real risk that it would mimic the litigation process and thus be prey to all rigidities of a trial. The strengths of this process are its informality and flexibility; strengths it gains from its brevity.

4. Present "Best" Case

Probably the two most important features of the minitrial are that first, the case presented should be the "best" case possible, no holds barred, no punches pulled; and second, that the case be made before representatives who have full authority to settle all aspects of the dispute. [Ref. 7:p. 9] Without these elements the process, whatever else it might be, could not be considered a minitrial and would not be likely to succeed.

When first hearing about the minitrial process, there is concern expressed that the lawyers will not in fact present the best possible case. [Ref. 29:p. 46] Lawyers do not like to disclose their strategies to their adversaries, especially

if, as is the case here, there is some risk that the settlements will fail and the case will then proceed to a traditional trial. By presenting the best case, won't a lawyer thus be giving away the store? And knowing this, won't each lawyer be tempted to reserve at least some relevant bits of information or arguments for an eventual trial?

Experience shows that in this arena the lawyers do not hold back. [Ref. 29:p. 47] The primary reason is that the two representatives are not only present, but also key participants in the process. The evidence is being shown to the business executives; the arguments are being made to the same executives. Ultimately, it is their decision that counts, not that of some judge or independent jury.

The minitrial is a settlement process. Only by soaking themselves in the facts and the law of the case, and by balancing the two, can the parties themselves, through their representatives, make an informed decision on whether to settle and for how much. Many cases fail to settle when the lawyers negotiate by themselves because neither they nor the client appreciates the realities of the situation. [Ref. 12:p. 186] Without a minitrial, settlement negotiations are often uninformed. Following a minitrial, the parties can assess far more accurately the probable results of a trial and take those results into account in their settlement negotiations.

5. Select Knowledgeable and Neutral Advisor

Not every minitrial utilizes the services of a neutral advisor. There have been cases in which the parties met in one of the lawyers' offices and presented the evidence and hashed out the arguments. [Ref. 9:p. 68] However, in most cases, the minitrial seems to work best if the parties jointly choose a neutral adviser to moderate the proceedings if things become too heated, to keep the players to the agreed upon schedule, and to give an informed opinion on the likely outcome of the case should the business representatives fail to settle and the case goes on to trial. [Ref. 16:p. 49]

Professor Eric Green of Boston University Law School (and one of the originators of the minitrial) has identified seven reasons for preferring a third-party neutral advisor. [Ref. 17:p. 32-33]

a. Catalyst for Compromise

The neutral can help parties seek joint gains by devising new compromises and helping to elaborate what appears to be a single problem into an integrated negotiation with several components over which the parties can bargain. This enables the negotiators to search for and achieve a "win-win" outcome, rather than a "you lose, I win" outcome. In a minitrial, the business representatives' creativity is catalyzed by the participation of the third-party neutral.

b. Bridges the Gap

The neutral can bring the parties together during the information exchange. In a minitrial, he or she often bridges the gap between the disputing parties, cuts through suspicion, and thus brings the players to the table.

c. Establishes Procedural Ambience

The third party can help establish the proper procedural ambience for negotiation before, during, and after the information exchange. The advisor helps to set the rules in the dispute, can lead the discussion, and can set an agenda. Sometimes the third party can smooth out interpersonal conflict. If necessary, the third party can prepare neutral minutes.

d. Clarifies Values and Worth

The neutral can help parties clarify values and derive reasonable prices. A third party with hands-on litigation experience can help the parties analyze their cases and advise them on a settlement outcome. This is especially important when each party believes that it has a high probability of succeeding at trial. The minitrial is ideal for cases in which each side estimates that its chances of success are 75 percent or higher.

e. Deflates Unreasonable Expectations

A neutral can deflate unreasonable claims and loosen commitments. The minitrial minimizes excessive

posturing and breaks down barriers and entrenched positions. The third-party neutral allows people to see with a fresh, unbiased perspective.

f. Facilitates Continuation of Negotiations

The neutral can keep negotiations going when they threaten to break down by being an advocate for agreement. The neutral holds communication lines open and helps each side save face.

g. Promotes Acceptance of a Solution

Finally, the neutral can articulate the rationale for agreement, thereby promoting acceptance of a satisfactory solution.

These reasons will hold if the parties have done their homework and selected an appropriate neutral advisor, a person who is familiar with the industry and the types of issues that will be raised and the responses that will be made. Precisely because the neutral advisor is knowledgeable, the parties will trust his or her analysis of the probable outcome of the case should it go to trial, thus giving them a far greater incentive to reach agreement on their own. [Ref. 31:p. 11]

6. Hold Settlement Talks Immediately

Once the minitrial has concluded, the representatives, who have full authority to settle, should meet immediately to discuss how settlement can be reached. "Immediately" means

just that: as soon as the hearings have concluded, the representatives should retire to a separate room and talk. In a few instances, representatives have waited to hear comments from the neutral advisor, or have permitted some time to go by for the advisor to seek additional evidence. [Ref. 14:p. 127] However, the preferred course is to talk immediately, for the simple reason that the entire case is fresh. In all likelihood a spirit of goodwill has been engendered during the course of the exchange and this can be enough to carry the representatives through what could be difficult negotiations and what certainly will be critical moments of the entire process.

In most cases, the representatives negotiate privately, that is, without their lawyers present. [Ref. 14:p. 129] If agreement is reached in principle, the lawyers will reenter the picture because they will need to put the agreement in writing. In virtually every case, the outcome of a minitrial is a contract stating the rights and obligations of the parties and explicitly providing for the termination of any pending litigation. [Ref. 5:p. 223]

7. Provide for Confidentiality

The final common element of minitrials is confidentiality. The parties should agree in the protocol that the neutral advisor's comments and written opinions, if any, will not be offered as evidence or for any other purpose at a subsequent

trial. The neutral advisor should be disqualified from acting as an advisor, expert, or in any other capacity for either of the parties at any subsequent hearings. [Ref. 2:p. 24] Any documents, depositions, or statements made at the minitrial or in connection with it, including briefs submitted beforehand to the parties, should similarly be barred from use at any trial. [Ref. 2:p. 26] Many agreements explicitly state that even the fact that the minitrial took place is not to be referred to in the event that the settlement discussions fail.

The protocol should not neglect the second element of confidentiality in that the parties be spared any discussion of the proceedings by the public at large (assuming, as most do, that the parties wish to keep it secret). Again, this can be provided for easily enough in the protocol, which can bar any of the parties, the lawyers, or the neutral advisor from disclosing the existence of the agreement to conduct the minitrial, and from discussing the matter before, during, or after the minitrial hearing. [Ref. 21:p. 80]

Although there still remain legal uncertainties about the extent to which every facet of the minitrial can be kept confidential (especially where Government contracts are involved), much of it probably can be kept confidential. This assurance will provide an atmosphere in which the parties can confidently attempt to resolve the dispute quickly, cheaply, and with a minimum of rancor.

C. CATALYST FOR THE FUTURE

Despite the obstacles mentioned earlier, the Government has already begun exploring ADR techniques, such as minitrials, because of several factors relating to litigation.

The most obvious catalyst for exploration of alternative resolution techniques is the rising cost of litigation and the court delays which face all private parties, and with perhaps even greater force, the Government. Disputes between the DoD and its suppliers was the natural result of an increase in federal procurement spending and likewise, the downsizing has made DoD funds even more precious to defense contractors. Although the administrative appeals boards were designed as a streamlined alternative to court litigation, the costs are still substantial because of the formal procedures of the boards. Minitrials, however, have resulted in substantial savings for those parties that have utilized them. For example, in the NASA/TRW case, which was the first minitrial used in the context of Government procurement, it was estimated that the savings "were probably more than $1 million in legal fees alone. [Ref. 22:p. 26]"

Another factor making the minitrial particularly attractive to the Government is related to the required procedures of the Contract Disputes Act itself. The required disputes clause in Government contracts requires that Federal suppliers continue performance, notwithstanding a dispute with the Government. The contractor may not stop work and

immediately challenge in court an agency order or contract interpretation. [Ref. 8:p. 118] Another mandatory clause in all Government contracts, the "Changes Clause", also allows the Government to insist upon changes to the contract during performance. [Ref. 8:p. 122] These allowable Government changes would of course be considered breaches of contract in a commercial setting. In exchange for these two conditional clauses, the Government must pay a fair amount for additional work. Problems arise, however, when the Government does not consider one of its directions as being a "change" in the contract. The contractor must continue to perform and leave for later the question of who will bear additional costs. An efficient, expedited resolution of the dispute by minitrial settlement would therefore lessen the adversarial roles between the Government and its supplier..."a phenomenon that serves the ongoing business relationship of the parties to Government contracts. [Ref. 22:p. 19]"

D. CHAPTER SUMMARY

This chapter dealt with possible applications of the minitrial to Department of Defense disputes. It first stated the obstacles that must be overcome in utilizing the minitrial, or for that matter, any form of alternative disputes resolution. The conditions necessary to produce success were then extensively detailed. They include negotiating the ground rules up front, limiting preparation

time, abbreviating the hearing, presenting "best" case, selecting a knowledgeable and neutral advisor, and providing for some sort of confidentiality. Finally, a recommendation was provided pushing the use of minitrials as a catalyst for resolving successfully disputes between the DoD and its defense contractors.

The final chapter provides conclusions, recommendations for minitrial use, and areas for further research.

V. CONCLUSION AND RECOMMENDATIONS

A. RESEARCH QUESTIONS SUMMARIZED

Former Chief Justice of the United States Supreme Court, Warren Burger, identified both the need and the potential opportunities for all forms of alternative disputes resolutions in the following words:

> Our distant forebearers moved slowly from trial by battle and other barbaric means of resolving conflicts of disputes, and we must move away from the total reliance on the adversary contests for resolving all disputes. For some disputes, trials will be the only means, but for many, trials by the adversary contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people. To rely on the adversary process as the principal means of resolving conflicting claims is a mistake that must be corrected. The plaintive cry of many frustrated litigants echoes what Hand said: "There must be a better way." [Ref. 6:p. 62]

There is a better way; it is called alternative means of dispute resolution, or simply ADR. While some see ADR as merely a "fad" and question its specific utility in Government disputes, ADR has helped and continues to successfully help resolve private conflicts similar to those conflicts heard by the Boards of Contract Appeals. This thesis' main contention is that it is time for the Department of Defense, and those individuals who deal with it, to explore seriously the potential uses for ADR, specifically the minitrial, and to

begin creating an atmosphere in which these methods can be more readily employed.

The good news is that within the Government contracts community, a small but promising movement has begun away from the perilous trend of red tape, proceduralism, and intolerable delay. The bad news is that the movement is much too slow. There is almost universal agreement amongst contractors, DoD officials, Government attorneys, auditors, inspector generals, and administrative judges that Government contract appeals have become too complicated, too expensive, and altogether too time consuming. Despite Congress' declared goals in the Contract Disputes Act of 1978 to encourage negotiated settlement by providing an expeditious alternative to court litigation, appeals now are rarely resolved expeditiously or inexpensively, in any forum.

Why then, with all the principal participants in DoD disputes clamoring for some sort of change, did the ADR movement that was building in the mid 1980s, slow to a trickle in the early 1990s?

The primary reason is that contracting officers fear being second-guessed by superiors, auditors, Congressmen, and/or the press. This fear significantly reduces any incentive to take sensible steps to settle a complex or controversial problem. Not surprisingly, this uncertainty can cause some defense contractors to prefer to appeal a decision rather than to waste their time negotiating what could be a tenuous

settlement. Increasingly, management problems are handed over to lawyers and accountants to be resolved in forums hardly designed for efficiency. Often, the criteria used are only marginally relevant to the real issues in the dispute, resulting in an ever increasing caseload at the Boards and Courts. A common complaint is that the Boards themselves, originally created as a sort of alternative means of dispute resolution, have become too "judicialized." [Ref. 32:p. 89] The burdens of traditional litigation, the very situation the boards were created to avoid, are now virtually inevitable because of the increased use of depositions, discovery, and opinion writing.

What is the solution? Although the numbers are small, the success rate for the Government utilization of the minitrial is excellent. Of the eleven cases that have been "minitried" by the Government, all but one settled. The potential for success is clearly evident, however, a new mind set must take place before any form of ADR becomes common practice.

All dispute cases potentially are appropriate for ADR or minitrial use, except those which are clearly dependent on legal issues. If implemented properly, the minitrial is a useful alternative to litigation in the resolution of contract claims disputes when: there is close factual question as to entitlement, and there are experts who support both the Government's and contractor's position; when agreement has been reached as to entitlement, but the parties cannot agree

on quantum; and when legal or technical staff presents an overzealous assessment of the Government's position. The minitrial can demonstrate to the contracting officer the weaknesses, as well as the strengths, of the Government's position. This enables the contracting officer to better assess the merits of the claim.

To that end, the disputes claims that are most appropriate for minitrial resolution are: differing site disputes in which the parties disagree on the conditions of the site; disputes arising from the agency changing the work required under the contract; defects in contract specifications with which the contractor finds it impossible to comply; defective pricing audits; and disputes over construction and ship repair contracts. [Ref. 23:p. 4]

B. RECOMMENDATIONS AND CONCLUSION

Advocates must now focus on selling the use of ADR techniques on an individual basis. Widespread dissemination of information on the processes and their benefits is needed to overcome the misconceptions and general unfamiliarity that block their acceptance.

The full potential of the minitrial cannot be attained without a cultural change within most contracting agencies. Effective use of ADR means coming to grips with the dispute before reaching a dispositive solution. To mold genuine, enthusiastic support for ADR techniques, specifically the

minitrial, will require specific and sustained efforts on many fronts. Following are six recommendations for pushing ADR as a viable alternative to litigation: [Ref. 3:p. 24]

1. Designation of "Disputes Resolution Advocates" within agencies and large contractor organizations,

2. Stronger Federal policy statements encouraging ADR at the contracting officer level,

3. Government contract clauses describing all ADR possibilities,

4. More complex and comprehensive ADR test programs,

5. Development of ADR training programs for both Government and industry personnel, and

6. Evaluation of contracting officers on their effectiveness in managing contract disputes.

To date, no compelling arguments have been made against the use of minitrials to supplement the overworked claims system. Prior experience in the private sector and limited Government application have both produced attractive results. The Government and defense contractors alike stand to benefit from the potential of time and cost savings, and decisions that are more tailored to the unique circumstances of each case.

The Department of Defense should adopt policies promoting and encouraging the use of minitrials in resolving disputes. The DoD policy should encourage regular review of cases for susceptibility, with caution not to undermine the process with excessive regulations and standardization. The policy

should offer advice on how to document the process and justify settlements in order to protect decision makers. Policies should be supplemented with training and outreach efforts on minitrials and other ADR applications. Whether these efforts will suffice remains to be seen. However, without these kinds of initiatives, Government contract disputes will continue to be handled in a manner that leaves most parties dissatisfied. Clearly, "there must be a better way."

C. RECOMMENDATIONS FOR FUTURE RESEARCH

As a result of this thesis, there are two possible areas for future research. The first is to try to determine why contracting officers are reluctant to utilize the minitrial, or any other form of ADR, and what can be done to make minitrials, not litigation, the desired form of dispute resolution. Secondly, in the same vein, research is needed to determine the reluctance of defense contractors in utilizing the minitrial technique. This research should include potential procedures and necessary modifications to current instructions that would be required in order to overcome the reluctance to ADR, and more specifically, the minitrial.

APPENDIX A

MINI-TRIAL PROTOCOL AGREEMENT BETWEEN UNITED STATES OF AMERICA AND

_____

This Mini-Trial Protocol Agreement (the "Protocol Agreement"), dated this _____ day of _____, 19_ is executed by [NAME], [TITLE], behalf of the United States of America (the "United States by [NAME], on behalf of [NAME] ("XYZ Corp.").

RECITALS

1. The United States and XYZ Corp. are currently engaged in litigation [or are about to engage in litigation] in the United States District Court for _____

2. The United States and XYZ Corp. have to seek a resolution of [NAME OF CASE] Docke _____ through the use of a Mini-Trial.

3. This Protocol Agreement is intended to set forth conditions under which the parties will conduct the Mini-T thereby avoiding future disputes and disagreements.

AGREEMENT

NOW, THEREFORE, subject to the terms and conditions o Agreement, the parties mutually agree as follows:

1. The United States and XYZ Corp. will volun engage in a non-binding Mini-Trial on the issue of _____

[THE ISSUES MAY BE DELINEATED SPECIFICALLY OR GENERALLY DEPENDING ON THE NATURE OF THE CASE]. The Mini-Trial will be held on _____, 19___, at [TIME OF DAY] [LOCATION].

2. The purpose of this Mini-Trial is to inform the principal participants of the position of each party on the issues in the case and the underlying bases of the parties' positions. It is agreed that each party will have the opportunity and responsibility to present its "best case" on entitlement and quantum.

3. The principal participants for the purpose of this mini-trial will be _____ for the United States and _____ for XYZ Corp.. The principal participants have the authority to settle the dispute or to make a recommendation concerning settlement. Each party will present its position to the principal participants through that party's designated representative, _____, for the United States, and _____, for XYZ Corp..

4. The parties have agreed that _____ shall serve as a Neutral Advisor to the principals. The Neutral Advisor shall be compensated as set forth in the Financial Agreement. The Advisor has warranted that he or she has had no prior involvement with this dispute or litigation and has agreed that he or she will not participate in the litigation should the Mini-Trial fail to resolve the dispute. The Neutral Advisor

shall participate in the Mini-Trial proceedings and shall
an opinion, upon request, on the following issues: _____

[THIS CLAUSE SHOULD BE USE
IF THE PARTIES HAVE AGREED THAT THE PARTICIPATION OF A NEU
ADVISOR WOULD BE USEFUL]

5. All discovery will be completed in twenty workin
following the execution of this Protocol Agreement. Neith
party shall propound more than 15 interrogatories or reque
admissions, including subparts; nor shall either party tak
than five depositions and no deposition shall last more tha
three hours. Discovery taken during the period prior to t
Mini-Trial shall be admissible for all purposes in this
litigation to the same extent as any other discovery, incl
any subsequent hearing before any court of competent autho
the event this Mini-Trial does not result in a resolution
matter. It is agreed that the pursuit of discovery during
period prior to the Mini-Trial shall not restrict either p
ability to take additional discovery at a later date. In
particular, it is understood and agreed that partial depos
may be necessary to prepare for the Mini-Trial. If this m
is not resolved informally as a result of this procedure,
complete depositions of the same individuals may be necess
In that event, the partial depositions taken during this i
period shall in no way foreclose additional depositions of
same individual into the same or additional subject matter
later hearing.

6. The presentations at the Mini-Trial will be informal. The rules of evidence will not apply, and witnesses may provide testimony in narrative form. The principal participants may ask any questions of the witnesses. However, any questioning by the principals, other than that occurring during the period set aside for questions, shall be charged to the time period allowed for that party's presentation of its case as delineated in Paragraph 8.

7. At the Mini-Trial proceeding, the representatives have the discretion to structure their presentations as desired. The presentation may include the testimony of expert witnesses, the use of audio visual aids, demonstrative evidence, depositions, and oral argument. The parties agree that stipulations will be utilized to the maximum extent possible. Any complete or partial depositions taken in connection with the litigation in general, or in contemplation of the Mini-Trial proceedings, may be introduced at the Mini-Trial as information to assist the principal participants to understand the various aspects of the parties' respective positions. The parties may use any type of written material which will further the progress of the Mini-Trial. The parties may, if desired, no later than ____ weeks prior to commencement of the Mini-Trial, submit to the representatives for the opposing side a position paper of no more than 25 - 8 1/2" X 11" double spaced pages. No later than ____ weeks(s) prior to commencement of the proceedings, the parties

will exchange copies of all documentary evidence proposed
at the Mini-Trial and a list of all witnesses.

8. The Mini-Trial proceedings shall take one day.
morning's proceedings shall begin at ____ a.m. and shall c
until _____ a.m. The afternoon's proceedings shall begin
_____ p.m. and continue until _____ p.m. A sample sche
follows:

9:00 a.m. - 10:00 a.m.	XYZ Corp.'s position and cas presentation.
10:00 a.m. - 11:00 a.m.	United States' cross-examina
11:00 a.m. - 11:30 a.m.	XYZ Corp.'s rebuttal.
11:30 a.m. - 12:00 noon	Open question and answer per
12:00 noon - 1:00 p.m.	Lunch
1:00 p.m. - 2:00 p.m.	United States' position and presentation.
2:00 p.m. - 3:00 p.m.	XYZ Corp.'s cross-examinatio
3:00 p.m. - 3:30 p.m.	United States' rebuttal.
3:30 p.m. - 4:00 p.m.	Open question and answer per
4:00 p.m. - 4:30 p.m.	XYZ Corp.'s closing argument
4:30 p.m. - 5:00 p.m.	United States' closing argum

9. Within _____ day(s) following the termination of
Mini-Trial proceedings, the principal participants should
or confer, as often as they shall mutually agree might be
productive for resolution of the dispute. If the parties
unable to resolve the dispute within _____ days following

completion of the Mini-Trial, the Mini-Trial process shall be deemed terminated and the litigation will continue.

10. No transcript or recording shall be made of the Mini-Trial proceedings. Except for discovery undertaken in connection with this Mini-Trial, all written material prepared specifically for utilization at the Mini-Trial, all oral presentations made, and all discussions between or among the parties and/or the Neutral Advisor at the Mini-Trial are confidential to all persons, and are inadmissible as evidence, whether or not for purposes of impeachment, in any pending or future court or administrative action which directly or indirectly involves the parties and the matter in dispute. However, if settlement is reached as aa result of the Mini-Trial, any and all information prepared for, and presented at the proceedings may be used to justify and document the subsequent settlement. Furthermore, evidence that is otherwise admissible shall not be rendered inadmissible as a result of its use at the Mini-Trial.

11. Each party has the right to terminate the Mini-Trial process at any time for any reason whatsoever.

12. Upon execution of this Protocol Agreement, if mutually deemed advisable by the parties, the United States and the XYZ Corp. shall file a joint motion to suspend proceedings in the appropriate court. The motion shall advise th court that the suspension is for the purpose of conducting a

Mini-Trial. The court will be advised as to the time sched established for completing the Mini-Trial proceedings.

DATED:_____

BY:_____

Principal Representative for the United States

DATED:_____

BY:_____

Principal Represent for XYZ Corp.

DATED:_____

BY:_____

Neutral Advisor

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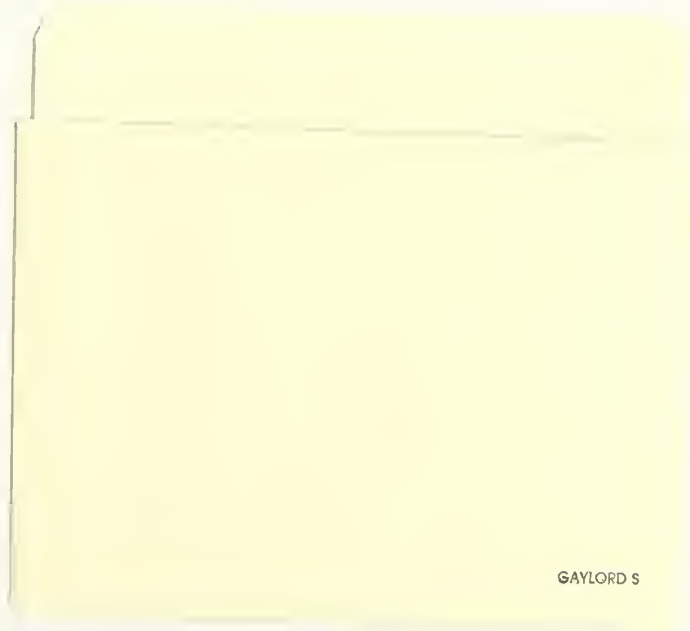

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